No. 14,782

In The United States Court of Appeals

For the Ninth Circuit

GLENN WOODBURY and PEARL WOODBURY,
Appellants,

vs.

ALFRED CLERMONT and MARGUERITE I. CLERMONT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEES

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JURISDICTION

This appeal involves an action by Alfred Clermont and Marguerite I. Clermont as plaintiffs (Appellees here), both citizens of the Dominion of Canada, against Glenn Woodbury and Pearl Woodbury as Defendants (Appellants here), both citizens of the State of Montana, for the sum of Five Thousand Dollars ($5,000.00) earnest money deposit under a contract for the sale and purchase of real

property which Appellees allege was breached by Appellants.

Jurisdiction was conferred upon the District Court by 28 U.S.C.A. 1332, Subdivision (a) 2. Paragraph I of the Complaint (R. p. 3) alleges the diversity of citizenship and that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs. The allegations of this Paragraph I of the Complaint are admitted by the Second Defense of the Answer (R. p. 19).

Judgment in favor of plaintiffs (Appellees here) was entered February 4, 1955 (R. p. 38-39) and within thirty days and on March 2, 1955, the Defendants (Appellants here) filed a Notice of Appeal (R. p. 40). The jurisdiction of this court is invoked under 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

Appellees brought this action against Appellants to recover the $5,000.00 earnest money deposit made under a written contract, designated "Receipt and Agreement to Sell and Purchase," entered into on May 2, 1953 and providing for the sale of a ranch in Montana, for the total sum of Thirty-six Thousand Dollars ($36,000.00), from Appellants as Sellers to Appellees as Purchasers. The execution of the contract is admitted by the pleadings (Complaint, Paragraph II, R. p. 3-4; Answer, Second Defense, R. p. 19) and it appears as Exhibit A to the Complaint (R. p. 11) and was introduced in evidence as Plaintiffs' Exhibit 3 (R. p. 127) and appears again on page 260 of the Record.

Paragraph numbered one of this contract provides:

"1. It is further agreed: Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof, at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except Mortgage to B. Jamsen $16,200.00 and Federal Land Bank, $3563.98.

It is further agreed that the broker assumes no responsibility in regard to the title and broker recommends that Purchaser have the Abstract of Title or Title Insurance Policy examined by an attorney."

Paragraph numbered four of this same contract provides:

"4. If Seller does not approve this sale within approved days hereafter, or if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase; but if said sale is approved by the Seller and Seller's title is merchantable or insurable and purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove provided, then the said earnest money shall be forfeited to the Seller as liquidated damages and not as a penalty and this Agreement thereupon shall be of no further force or effect."

On the date of execution of said contract, May 2, 1953, Appellees paid the sum of $5,000.00 as an earnest money deposit to Appellants (Paragraph III of the Complaint, R. p. 4; admitted by Second Defense of Answer, R. p. 19).

On June 11, 1953, the Appellees made demand upon Appellants for an abstract of title (Plaintiffs' Exhibit No. 2, R. p. 52-53) in the form of a letter, the receipt of which was admitted by Mr. Woodbury, one of the Appellants (R. p. 115). The abstract of title was furnished to attorneys for Appellees on June 18, 1953 (R. p. 118) and written notice containing a statement of defects in the title rendering it unmerchantable was sent by Appellees to Appellants on June 22, 1953. This notice is attached to the Complaint as Exhibit B and the receipt thereof is admitted by Appellants both in the pleadings (Complaint, Paragraph VII, R. p. 6; admitted by Second Defense of Answer, R. p. 20) and by the testimony (R. p. 118).

On July 27, 1953, Appellees again wrote to Appellants concerning the defects in the title to the real property. This letter appears an Exhibit C to the Complaint (R. p. 16) and the receipt of it is admitted by Appellants both in the pleadingss (Complaint, Paragraph VIII, R. p. 6; admitted by Second Defense of Answer, R. p. 20) and by the testimony (R. p. 107).

By letter of July 30, 1953, Appellants advised Appellees that the two letters from Appellees of June 22, 1953 and July 27, 1953 had been turned over to attorneys for Appellants who were checking over the objections made to the title and further, "You may be assured that the matter is being promptly taken care of and that we will act on the advice of our attorneys in the matter of clearing up any defects in merchantability of title." The writing and receipt of this letter is likewise admitted by the pleadings and also the testimony (Complaint, Paragraph

IX, R. p. 6 and 7; admitted by Second Defense of Answer, R. p. 20).

Whereas the written contract between the parties (R. p. 11, 260) required Appellants as Sellers to furnish an abstract of title showing in Sellers merchantable title to the real property, except for mortgage to B. Jannsen and Federal Land Bank, the abstract actually disclosed that the title to the property stood in the names of Bernhard Jannsen and Anna Jannsen (Complaint, Paragraph V, R. p. 5; admitted by Second Defense of Answer, R. p. 19; also admitted in testimony of Glenn Woodbury, R. p. 71, 136). Instead of holding title, Appellants were purchasing the real property under a contract of sale from the Jannsens, a copy of which was furnished to attorneys for Appellees at the time the abstract of title was delivered to them (R. p. 71).

In addition to the mortgage in favor of the Federal Land Bank, the abstract also disclosed that the real property was encumbered by the lien of a repayment contract between the Bitter Root Irrigation District and the United States in an undisclosed amount (Complaint, Paragraph VI, R. p. 5; admitted by Second Defense of Answer, R. p. 19-20; also proved by testimony of Elsie W. Oliva, R. p. 47-48). A copy of that repayment contract was introduced in evidence as Defendants' Exhibit 1 and appears in the Record at pages 224 to 259. This lien extended to 121 acres of the lands which were the subject of the contract of sale involved in this action and the amount of the lien per acre on May 2, 1953, the date of said contract, was $39.26, making a total lien of $4,750.46 against said prop-

erty (R. p. 47-48). A payment by the Bitter Root Irrigation to the United States in July of 1953 reduced the amount of the lien per acre to $38.37, thereby reducing the total lien against the property in question to $4,642.77 (R. p. 47-48).

These defects in title were not remedied by Appellants (R. p. 54, 65, 121) notwithstanding Appellants' letter of July 30, 1953 (Complaint, Exhibit D, R. p. 17) which indicated some action would be taken and notwithstanding Mr. Woodbury's testimony at the time of trial that he was in a position to pay off the Jannsen contract so as to obtain title and also to pay the construction charges of the irrigation district and thereby remove the property from that lien. (R. p. 108 and 109). Because no action was taken by Appellants to remove the defects, this action was filed by Appellees on October 7, 1953.

The pleadings establish the execution of the contract between Appellants and Appellees, the earnest money deposit of $5,000.00, delivery of abstract to Appellees, the existence of title defects, namely that the title stood in the names of the Jannsens rather than in Appellants and the existence of the lien of the Bitter Root Irrigation District, notice to Appellants of said defects in the title. The failure of Appellants to remedy those defects was established through evidence (R. p. 121).

Through a second cause of action, Appellees sought relief from forfeiture under the provisions of Section 17-102, Revised Codes of Montana of 1947 which reads as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Possession of the ranch property was retained by Appellants, never delivered to Appellees (R. p. 56, 67, 137). Appellants harvested the 1953 crop and kept the entire crop (R. p. 137-138). The freedom of Appellees from gross negligence, and willful or fraudulent breach of duty is to be gathered from the evidence as a whole.

The trial court's Findings of Fact and Conclusions of Law (R. p. 31-38) determined any conflict of fact in favor of Appellees and held that Appellees were entitled to the return of the $5,000.00 earnest money deposit under the terms of the contract, and also found that Appellees had established their right to equitable relief under Section 17-102, R.C.M. 1947 which was, however, co-extensive with their legal right in view of the fact that Appellees were never in possession of the property. Accordingly judgment was entered in favor of Appellees and against Appellants in the amount of $5,000.00 with interest from October 7, 1953 and for costs of Appellees (R. p. 38-39).

QUESTIONS INVOLVED

Because of the lack of specificity in Appellants' so-called *Assignments of Error,* it is rather difficult to narrow the issues being presented by Appellants on this appeal. However, from contentions made by Appellants in

the trial court and from Appellants' brief before this Court, the following questions seem to be raised:

(A) Was payment by Appellees of the entire purchase price balance of $11,000.00 a condition precedent to Appellants' obligation to furnish a merchantable title?

(B) Was it necessary for Appellees to prove that they were ready, willing and able to perform under the contract and to prove a tender of the balance due on the purchase price?

(C) Were the specified title defects waived by Appellees?

(D) Did Appellees establish their right to relief from forfeiture under Section 17-102, R.C.M. 1947?

ARGUMENT

It is extremely difficult to meet the argument presented in the Brief of Appellants because the Assignments of Error do not raise objection to any specific Finding of Fact or Conclusion of Law made by the Trial Court. That portion of Appellants' Brief entitled "Assignments of Error" raises several general propositions and the Appellants' argument does not even follow the questions raised under the so-called "Assignments of Error." Consequently the discussion in Appellees' Brief must be general in nature.

A. NO PROPER SPECIFICATION OF ERROR

There is an absolute failure in the Brief of Appellants to comply with Rule 18 (d) of the Rules of the

United States Court of Appeals for the Ninth Circuit, which provides, in part:

> "In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. . . . In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusion of law are alleged to be erroneous."

It is significant to note that there is no specification of error as to any Findings of Fact or as to any Conclusion of Law made by the Trial Court and it is therefore urged that the Findings of Fact and Conclusions of Law should be accepted inasmuch as no direct attack is made upon any specific Finding of Fact or Conclusion of Law.

In *United States v. Cushman,* 136 Fed. (2) 815, a Ninth Circuit decision, it was said:

> "Appellant could have specified these findings as error and could thereby have raised the question of the sufficiency of the evidence to support the findings, but has not done so. We nevertheless have examined the evidence and have satisfied ourselves that it does support the findings, that the findings are not clearly erroneous, and that therefore we ought not to set them aside. . . . The second specification is that 'the trial court erred in ordering judgment.' This is not a proper specification of error. It does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing, presents nothing for review."

The "Assignments of Error" made by Appellants do no more than assert that the Trial Court erred in entering

judgment for Appellees. Under the holding of the case cited above, this presents nothing for review.

B. FINDINGS OF FACT CONCLUSIVE UNLESS CLEARLY ERRONEOUS

The Federal Rules of Civil Procedure, Rule 52 (a) provides, in part:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

Upon the basis of this rule, it has been held that the Findings of Fact of a Trial Court are presumptively correct and will not be set aside unless they are clearly erroneous, giving due regard to the Trial Court's opportunity to judge the credibility of the witnesses.

Wingate v. Bercut et al, 146 Fed. (2d) 725 at page 728 (Ninth Circuit)

Paramount Pest Control Service v. Brewer, 177 Fed. (2d) 564 at page 567 (Ninth Circuit).

Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation, 178 Fed. (2d) 541 at page 548 (Ninth Circuit).

36 C.J.S. Page 408, Sec. 297 (3) (a) under Federal Courts.

Most of the essential allegations of the Complaint are admitted by the Answer so that there are very few fact issues or combined issues of fact and law for determination by the Trial Court. On those issues, it is urged, Appellants cannot claim the benefit of the weight of the evidence and on the contrary, the weight of the evidence, in the view of Appellees, preponderates in their favor. At

the most, it can be said that the evidence on these issues was conflicting and therefore it is urged that the Findings of Fact and Conclusions of Law made by the Trial Court should be given the benefit of the presumption noted above.

C. SUMMARY OF THE EVIDENCE

The admissions in the pleadings, coupled with the uncontroverted testimony of witnesses, establishes the following sequence of events:

(1) *May 2, 1953*: Execution by the parties of Receipt and Agreement to Sell and Purchase (R. p. 11, 260).

(2) *June 11, 1953*: Letter from Appellees to Appellants requesting delivery to them or their attorneys of an Abstract of Title for the real property which was the subject of the sales agreement (Plaintiffs' Exhibit numbered 2, R. 52-53).

(3) *June 15, 1953*: Glenn Woodbury called upon W. T. Boone, one of the attorneys for Appellees, but refused to leave the abstract of title unless Mr. Boone paid the balance of $11,000.00 due on the purchase price (R. p. 104-105, 116).

(4) *June 18, 1953*: Glenn Woodbury, after consultation with his attorneys, delivered to Mr. Boone the abstract of title and a copy of the agreements between Jannsens and Woodburys (R. p. 106-107, 117-118).

(5) *June 22, 1953*: Letter from the Clermonts (Ap-

pellees) to the Woodburys (Appellants) specifying defects found in the abstract of title to the real property which was the subject of the sale agreement (Complaint Exhibit B, R. p. 13-15; receipt thereof acknowledged by Appellants through Second Defense of Answer, R. p. 20, and also by the testimony of Glenn Woodbury, R. p. 107, 118).

(6) *July 27, 1953*: Letter from the Clermonts (Appellees) to the Woodburys (Appellants) calling attention of the Woodburys to the fact that in more than one month that had elapsed since the letter of June 22, 1953 specifying defects found in the title, no response had been received from the Woodburys (Complaint Exhibit C, R. p. 16-17; receipt acknowledged by Second Defense of Answer, R. p. 20, and also by the testimony of Glenn Woodbury, R. p. 107).

(7) *July 30, 1953*: Letter from the Woodburys (Appellants) to the Clermonts (Appellees) acknowledging receipt of the Clermonts' letters of June 22 and July 27, 1953, advising that the matter had been turned over to the Woodburys' attorneys and that "we will act upon the advice of our attorneys in the matter of clearing up any defects in merchantability of title." (Complaint Exhibit D, R. p. 17; receipt admitted by Appellees through Complaint, Paragraph IX, and the writing of the letter admitted by Ap-

pellants in the testimony of Glenn Woodbury (R. p. 120).

(8) *October 7, 1932*: Complaint filed in this action (R. p. 17) with nothing having been done in the interim by Appellants to remedy the defects in title (admitted in the testimony of Glenn Woodbury, R. p. 121).

In addition to the sequence of events scheduled above, there was testimony introduced by Appellants over the objection of Appellees, relating to several conversations between Appellants and Appellees through which the Appellants urged the Appellees received notice and knowledge of (a) the fact that the relationship between the Woodburys and the Jannsens was a contract of sale rather than a mortgage, and (b) that the real property which was the subject of the sales agreement was encumbered by a lien of the Bitter Root Irrigation District under a repayment contract with the United States of America. Notice and knowledge of these two facts through the conversations were denied by Appellees.

D. PAYMENT OF FULL PURCHASE PRICE NOT CONDITION PRECEDENT TO QUESTION OF TITLE

Appellees take the position that Appellants were required under the sales agreement to furnish the abstract showing merchantable title prior to payment by Appellees of the balance due. This position is based upon: (a) the language of the contract, (b) the conduct of the parties

which in itself constituted an interpretation of the written contract, and (c) existing Montana law.

The Contract Language

The written contract (R. p. 11, 260) through its first numbered paragraph requires Seller to "furnish Purchaser an Abstract of Title continued to date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen, $16,200.00 and Federal Land Bank, $3,563.98."

Subsequently numbered Paragraph 4 of the contract provides that "if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing a statement of defects is delivered to Seller, then *said earnest money herein receipted for shall be returned to Purchaser* on demand. . ."

Taking the obligations to be performed under the contract, the obligation of the Seller to furnish the abstract under Paragraph 1 is the first obligation specified in the contract. Nothing is said in Paragraph 4 about returning any part of the purchase price other than the "*earnest money herein receipted for,*" indicating that the parties did not intend that the Purchasers be required to put up any additional money before the merchantability of the title was shown.

Paragraph 4 of the contract further provides: "But if said sale is approved by the Seller and Seller's said

title is merchantable or insurable and Purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove provided, then said earnest money shall be forfeited to the Seller . . .'' This provision further demonstrates that the merchantability of title is to be determined before any further sum becomes payable on the purchase price. *Interpretation by the Parties.*

It is admitted through the pleadings that on June 11, 1953 Appellees requested that Appellants furnish the abstract under the terms of the written contract and that having first refused to deliver the abstract on June 15, 1953 unless the balance of the purchase price were paid, and subsequently discussing the matter with their attorneys (R. p. 106-107, 117) the Appellants furnished said Abstract on June 18, 1953. Thus the parties themselves interpreted the contract as requiring merchantability of title to be determined prior to final payment by Appellees.

There are many Montana decisions which state that the interpretation placed upon a contract by the parties themselves is to be considered by the Court and is entitled to great influence in ascertaining their understanding of its terms.

Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 Pac. (2d) 599

Cook-Reynolds Co. v. Beyer, 107 Mont. 1, 79 Pac. (2d) 658

Smith v. School Dist. No. 18, 115 Mont. 102, 139 Pac. (2d) 518

Erie v. Wahl, 116 Mont. 515, 155 Pac. (2d) 201.

Montana Decisions.

The Appellees' First Cause of Action is not one for rescission but is an action based upon breach of the contract by Appellants. This distinction is recognized and expressed in the Montana case of *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694, where it was said:

> "There is a wide difference between the rescission of a contract and its mere termination or cancellation. 'It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation which still entitled the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment.' "

Even if the clear language of the contract (Paragraphs 1 and 4) were to be disregarded and further, even if the interpretation placed upon that contract by the parties were likewise to be disregarded, the Appellants became obligated under Paragraph 2 of the contract to convey title "free and clear of all encumbrances except building and zoning ordinances and regulations. . . ." Where this type of warranty of title is made, even if the contract did not have the provisions of Paragraphs 1 and 4 thereof, Appellants would be obligated by the Montana decisions noted below to demonstrate the merchantability

of their title before Appellees became obligated to pay the balance due on the purchase price.

In *Bozdech et al v. Montana Ranches Co.,* 67 Mont. 366, 216 Pac. 319, our Court stated:

> "When a vendor is unable to convey the title stipulated for in his contract at the time a conveyance is due, the vendee is not required to make any tender of the balance of the purchase price as prerequisite to his right to rescind."

Again in *Silfvast v. Asplund,* 93 Mont. 584, 20 Pac. (2d) 631, it was said:

> "The purchaser has the right to expect the removal of the defects before the time set (Maupin, above, 638; *Bell v. Stadler,* 31 Idaho, 568, 174 Pac. 129; *Higgins v. Eagleton,* 155 N. Y. 466, 50 N. E. 287), as the rule which allows a vendor to remove defects after the time for final performance does not apply when time is of the essence of the contract. (Maupin, above, 883)."

E. OFFER OF PERFORMANCE BY APPELLEES NOT AN ISSUE

Appellees contend that it was not necessary for them to prove that they were ready, willing and able to perform as a prerequisite to casting upon Appellants the obligation of furnishing merchantable title. What has been said above with respect to the claim by Appellants that they were not obligated to disclose merchantable title until Appellees had paid in full the balance on the purchase price applies likewise at this point and the Court's contention is directed to the decisions of *Bozdech et al v. Montana Ranches Co.* and *Silfvast v. Asplund,* both supra.

Another decision in this same connection is that of *Milwaukee Land Co. v. Ruesink*, et al, 50 Mont. 489, 148 Pac. 396, a case involving a contract for sale of real property.

The Montana Court held:

> "The variance is in the single particular as to when and how the balance of the purchase money was to be paid; otherwise the contract as alleged, and the terms of it, are clearly shown. The subject matter, the parties and the consideration were the same as alleged, and the obligation to make payment was the same. The plaintiff did not have title. It therefore could not, under the agreement as alleged or under that proved, have demanded performance by Way & Ratchford until it could tender a title."

In view of the specific provisions of the written agreement between the parties, in view of the interpretation of that agreement by the conduct of the parties, and in view of the Montana decisions noted herein, it is submitted that it was not necessary for Appellees to prove that they were ready, willing and able to perform. However, if that were a necessity, the evidence in this case supplies it. Marguerite I. Clermont, one of Appellees, testified as follows: (R. p. 183-184).

> Q. All right, now, after that conversation with Mr. Woodbury, did you then come to Missoula to make arrangements, financial arrangements for the money that would be necessary to meet this contract:
>
> A. Yes, we did.
>
> Q. *And were you, on June 15th, ready and willing financially to make the payment which was required under this contract to the Woodburys, $11,000, if the title had been satisfactory?*
>
> A. Yes. (Italics ours).

Mrs. Clermont again, under cross examination, testified that had the title been merchantable, she and Mr. Clermont were ready, willing and able to pay the balance due on the purchase price. (R. p. 186, 198 and 199).

Furthermore, although now insisting that Appellees were in default after June 15, 1953, the due date for the balance of the purchase price, Mr. Woodbury at the time of trial testified that he had agreed to extend the time for payment of the balance due. His testimony in this regard is as follows: (R. p. 101)

> A. I asked what the trouble was. He informed me again he wasn't able to get the money he had coming, and *I told him I wasn't going to hold him to that specific date.* He said that he couldn't afford to lose the money. I said, 'I don't want you to lose your money; I don't want your money for nothing, I merely want to complete the deal. I sold the place to you in good faith and I thought you bought it in good faith. *All I want is to complete the deal, but as far as the date of the 15th of June, I don't figure on holding you to it if you don't have the money at that time.''* (Italics ours.)

Again, under cross examination, Mr. Woodbury testified: (R. p. 135)

> "Q. They were asking for the time of payment to be changed so they could be sure and have the money available?
>
> A. That's right.
>
> Q. You refused to do that?
>
> A. No, I didn't refuse to change the time of payment; I refused to put it on a contract for them. I told them I would give them more time, but I didn't want to write a contract and carry it. I wanted it by fall. *I told them I would give them until fall if they needed it.''*

F. NO WAIVER BY APPELLEES

The evidence of Appellants as to conversations goes no farther than to assert notice and knowledge on the part of Appellees of the existence of the Jannsen contract of sale rather than the Jannsen mortgage, and of the existence of the lien of the United States of America by reason of its contract with the Bitter Root Irrigation District. Even if these conversations took place to the extent of giving notice and knowledge of the defects to Appellees, they do not excuse performance by Appellants under Montana law.

In *Bozdech et al v. Montana Ranches Co.*, 67 Mont. 366, 216 Pac. 319, mentioned supra, the Montana Court held:

> "Three of the cases cited by appellant directly and the other one indirecting rely upon *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542. The opinion in that case contains the following classification of encumbrances: 'Encumbrances are of two kinds, viz., (1) Such as affect the title; and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or a right of way, of the latter. Where encumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. (*Cathcart v. Bowman*, supra; *Funk v. Voneida*, 11 Serg. & R. 109). Such encumbrances are usually of a temporary character, and capable of removal; the very object of the covenant is to protect the vendee against them; hence *knowledge, actual or constructive, of their existence, is no answer to an action for breach of such covenant.*' The authorities are unanimous in supporting what is therein said concerning encumbrances af-

> fecting the title to lands. (See cases cited under section 913 in Devlin on Deeds and in the notes in 4 L.R.A. (n.s.) 309, and 32 L.R.A. (n.s.) 737). This court has recently expressed approval of that rule of *Adams v. Durfee,* ante, p. 315, 215 Pac. 664." (Italics ours).
>
> See also *Ayers v. Buswell,* 73 Mont. 518, 238 Pac. 591.

Even if the evidence of these conversations went beyond notice and knowledge alone and constituted a waiver, under the provisions of Section 13-607, R.C.M. 1947, parol evidence of any alleged oral waiver would be inadmissible. This section provides:

> "Effect of written contracts. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 13-907, R.C.M. 1947, provides:

> "Written contracts—how modified. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

In *Hollensteiner v. Anderson,* 78 Mont. 122, 252 Pac. 796, the plaintiff Hollensteiner brought the action to foreclose a vendee's lien for the amount paid on a contract for the purchase of real estate upon failure of consideration based upon defects in the vendor's title. Defendant was permitted, over the objection of plaintiff, to show that plaintiff understood that the property was being purchased without the timber. Upon appeal it was held that the admission of this testimony was error, the Montana Supreme Court saying:

> "If this testimony was competent to vary the terms of the contract, we would still have the title encum-

bered by the mineral reservations and the right of way; but as the deed was a unilateral contract not delivered to or accepted by the vendees, the contents of which were not known to the vendees, and the contract was complete in itself and did not require the vendees to determine whether the deed correctly described the property, but required the vendor to execute and deposit a deed conveying the property as therein described, the contract of June 11, 1918, is presumed to contain all the terms of the agreement between the parties. If it was the tentative agreement of the parties that the purchase was of the land subject to the rights of the Anaconda Company, the vendor should have had his contract so drawn; *having failed to do so, he was precluded by the provisions of section 10517, Revised Codes of 1921, from varying the terms of the written contract by parol evidence—a sad commentary on the practice of having important legal documents drawn by a layman.* This testimony, admitted over the objection of plaintiff, was therefore improperly admitted and cannot aid the findings made." (Italics ours).

See also *Bauer v. Monroe,* 117 Mont. 306, 158 Pac. (2d) 485; *Hart v. Barron,* 122 Mont. 350, 204 Pac. (2d) 797.

The evidence introduced by Appellants with respect to the conversations which are urged as constituting a waiver of the title defects were introduced over objection and received by the Court subject to the objection. The Appellees on rebuttal denied knowledge or notice of the title defects through the alleged conversations and thus even if this parol evidence properly could be received to vary the terms of the written contract, the testimony of Appellants with respect to the conversations was denied

and the Findings of Fact by the Trial Court should be conclusive on the conflicting testimony.

G. RELIEF FROM FORFEITURE

The Second Cause of Action of the Complaint seeks relief from forfeitiure under the provisions of Section 17-102, R.C.M. 1947, which is quoted above.

One of the early Montana cases under this section is that of *Cook-Reynolds Co. v. Chipman,* 47 Mont. 289, 133 Pac. 694, which was an action by plaintiff, as vendor, to recover possession of property and also to recover damages for unlawful withholding arising from a contract of sale between the plaintiff, as vendor, and the defendant, as vendee. The answer asked for the return to buyer of the $5,000.00 down payment, less a reasonable rental for the property until restored to the possession of plaintiff, and upon appeal it was held that the buyer's prayer for this relief should have been granted. The Court said:

> "We think the evidence as a whole shows that the appellant's breach of duty was not grossly negligent, willful, or fraudulent, and that it was entirely practical and not difficult to ascertain the damages of respondent on principles of compensation in accordance with the provisions to the statute. In these circumstances, appellant was in position to ask relief from the forfeiture of his payments in excess of respondent's damage, and that relief should in this case have been granted to him because of the conduct of respondent toward him and its effect upon him as detailed above."

See also *Huston v. Vollenweider*, 101 Mont. 156, 53 Pac. (2d) 112.

In the case at bar possession of the real property was

never delivered to Appellees and the Appellants consequently had the benefit of the rents, issues and profits thereof. Thus there was no consideration to be returned to Appellants and the Trial Court accordingly found that the Appellees had established their right to relief from forfeiture which was, however, co-extensive with their legal right under the contract in question to recover the $5,000.00 earnest money deposit.

The relief granted by the Court under the Second Cause of Action is not made the subject of any Assignment of Error by Appellants and is merely argued under Paragraph F, Page 39 to 43 of Appellants' Brief. It is submitted that Appellants have not raised for review the question of relief from forfeiture by reason of their failure to specify error in that connection. It is accordingly submitted that the Trial Court's Finding of Fact and Conclusion of Law with respect to forfeiture should be conclusive.

The written agreement in this case is dated May 2, 1953, the abstract was delivered June 18, 1953, the defects in title certified in writing to Appellants on June 22, 1953 and Mr. Woodbury testified that he re-listed the property for sale during the month of July 1953. (R. p. 122). The Clermonts never took possession of the premises, had no return from the property, and it is admitted that all the rents and profits for the year 1953 accrued to the Appellants (R. p. 137-138).

Because of the Appellants' failure to remedy the title defects in a period of more than three months, the Clermonts were compelled to institute this action to recover

the earnest money deposit of $5,000.00 and had to return to Canada to attempt to re-establish themselves in a home and business (R. p. 58-59). It is submitted that the evidence shows that the Clermonts, in each instance, acted in good faith and without delay and that they were not guilty of any grossly negligent, fraudulent or willful breach of duty.

The Appellants argue that no formal declaration of forfeiture had been made by them and that therefore Appellees cannot ask for relief from forfeiture. It should be noted that Section 17-102, R.C.M. 1947, provides that "whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture. . . ." Certainly if, Appelles were refused relief under the First Cause of Action, they would face a loss of $5,000.00 "in the nature of a forfeiture," and it is against that possibility that Appellees asked for relief from forfeiture under their Second Cause of Action.

H. OTHER CONTENTIONS BY APPELLANTS

In addition to the problems discussed above, Appellants' Brief argues various other questions to which it is felt some response should be made.

Ambiguity of the Agreement.

Appellants' whole argument is predicated upon their assertion that the agreement is ambiguous and therefore, they urge, resort must be had to parol evidence. To the contrary, there is no ambiguity in paragraphs 1 and 4 of the agreement which are the portions involved in this case. They very clearly required Appellants as Sellers to fur-

nish an abstract showing merchantable title, in default of which, after notice of the title defects, Appellants were to have a reasonable time to remedy the title. If the title was not made merchantable, Sellers became obligated to return the earnest money payment of $5,000.00. There is no ambiguity in these requirements.

If there be any ambiguity in the provisions of the agreement which are material in the case at bar, and it is submitted there is not, that ambiguity and the agreement itself must be interpreted under Montana law most strongly against the Appellants whose agent Hagarty (R. p. 124) prepared the agreement (R. p. 127). *Aleksich v. Mutual Benefit Health & Accident Ass'n.*, 118 Mont. 223, 164 Pac. (2d) 372, 162 A.L.R. 263.

Mr. Woodbury doubted that he read the agreement before signing it (R. p. 128) and his wife admitted she did not read it (R. p. 216). Mr. Hagarty, however, recalled that he read the agreement out loud to all of the parties (R. p. 173). In any event, Appellants should not be heard to charge ambiguity in any of the provisions of the agreement material to this case.

Reformation Not an Issue

There is no pleading or prayer by Appellants for reformation of the contract. There is no Specification of Error grounded upon reformation. It is not an issue in this case.

Even if it properly were an issue, Appellants have not established any right to reformation under the Montana case of *Sullivan v. Marsh*, 124 Mont. 415, 225 Pac. (2d)

868, in which it states that reformation must be based upon mutual mistake, the court saying:

> "The presumption is that the writing contains the final agreement of the parties and expresses their real purpose and intent. To meet and overcome that presumption plaintiff was required to present clear, convincing and satisfactory proof. . . . The general rule is that to obtain reformation the mistake must be mutual. . . . The record before us fails to show any mutual mistake."

Defects to be Remedied by Appellants

Appellants, tacitly admitting that they did nothing to remedy the defects of title, suggest that the defects should have been remedied by the Clermonts, notwithstanding the assurances given by Appellants in their letter of July 30, 1953 which said in part: "You may be assured that the matter is being promptly taken care of . . ."

The obligation under paragraph one of the agreement to furnish an abstract showing merchantable title is that of the Appellants as Sellers—not that of Appellees. Under paragraph 4 of the agreement, notice of the defects in the title is to be delivered to *"Seller."* Thus, under the written agreement, Appellants had the obligation of furnishing merchantable title.

The Appellants' letter of July 30, 1953 represents that they were assuming that obligation. No request was made that the Clermonts as purchasers should assume that obligation and no suggestion was offered that the money value of the defects might be computed and deducted from the balance due on the purchase price. Even if the value of the Irrigation District lien could be de-

termined and subtracted from the purchase price, which suggestion was not made, there would have been no way to convert the relationship between Appellants and the Jannsens from contract for deed to that of a mortgage, especially when the balance due under that mortgage far exceeded the balance due on the purchase price. The advantage of the mortgage relationship, with necessity of foreclosure in event of breach, right of redemption, right of occupancy during the one year redemption period need not be argued.

Hagarty's One Thousand Dollars

Appellants even argue that they should not be asked to return the entire $5,000.00 earnest money deposit because Mr. Hagarty, their real estate agent got $1,000.00 of it. Mr. Hagarty was admittedly their agent (R. p. 124).

Paragraph III of the Complaint (R. p. 4) alleges payment by Appellees to Appellants of the $5,000.00 earnest money deposit, an allegation admitted by the Second Defense of the Answer (R. p. 19).

CONCLUSION

Under the written agreement, Appellants assumed the obligation of furnishing an abstract disclosing merchantable title. The abstract was furnished, defects in the title duly specified by Appellees and Appellants undertook by their letter of July 30, 1953 to remedy the defects. Notwithstanding their assurances in that letter, which were in keeping with their contract obligation, Appellants absolutely failed in more than three months to do anything about the title defects. The following excerpt from the

testimony of Glenn Woodbury (R. p. 121) admits nothing was done:

> Q. Then, was there any communication from you or from your attorney, either to the Clermonts, or to me, at any time after July 30th with respect to this matter before this action was commenced in October, October 7th?
>
> A. Not to my knowledge.
>
> Q. In other words, there was not one single thing either you or your attorneys did about communicating with the Clermonts or with me with respect to this title, with the exception of that letter on July 30th?
>
> A. No, I guess not.

The obligations of Appellants is clear from paragraphs one and four of the agreement. Their failure to fulfill that obligation is admitted by the testimony quoted above.

There was ample evidence, in fact overwhelming evidence, to support each and all of the Findings and Conclusions of the Trial Court and the Judgment should be affirmed.

Respectfully submitted,

Russell E. Smith
W. T. Boone
Jack W. Rimel
Attorneys for Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN WOODBURY and
PEARL WOODBURY,
Appellants

vs.

ALFRED CLERMONT and
MARGUERITE I. CLERMONT,
Appellees.

No. 14,782

PETITION FOR RE-HEARING

To the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Circuit Judges thereof, Mathews, Healy and Fee:

Come now Glenn Woodbury and Pearl Woodbury, appellants in the above entitled cause and respectfully request that the said Circuit Court of Appeals re-hear, re-consider and alter the opinion and judgment herein made and given on the 10th day of August, 1956, upon the grounds and for the reason that the opinion of the Court disregards the fundamental rule of law that words especially inserted in a form contract will prevail over printed provisions. Section 93-401-19, Revised Codes of Montana, 1947, provides:

> "Written words control those printed in blank form. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former control the latter."

See also, *Backer v. Parker*, 87 Mont. 595, 599, 289 Pac. 571.

The opinion rendered violates this rule because it gives no effect to the provision in the contract reading: "Balance to Woodbury June 15, 1953." And because of two printed form provisions of the contract the Court has construed this especially inserted typed provision just exactly as if it had not been in the contract at all.

The above rule of law would apply even if these provisions of the contract were completely inconsistent, which is not the case.

For it is quite possible to give effect to the provision of the contract requiring the $11,000.00 payment to be made by June 15, 1953, as well as that requiring an abstract of title, as to the furnishing of which no date whatsoever is specified. Consequently, if the Circuit Court of Appeals is going to decide the case on the issue of whether the agreement required this payment

to be made on June 15, 1953, we respectfully submit that the contract could hardly be clearer in its terminology, and that even if there be considered an inconsistency therein, then under Montana law, the especially and particularly written payment date would control regardless of whether or not an abstract had been furnished by this time or not, time being of the essence.

The appellants have not sought to avoid the effect of their contract whatsoever, and are willing to perform it completely. And in fact, they have enough money coming from the appellees so that the lien of the irrigation ditch can be paid in full and still leave a balance for the appellants. This is in accordance with the language of paragraph three of the contract itself, which specifies:

> ". . . encumbrances . . . may . . . be paid out of the purchase money at the date of closing."

We think that the testimony given by one of the appellants himself standing uncontradicted as it does is the best legal exposition of his position that could be made. He said (Tr. 106):

> ". . . I would make the abstract good, whatever it took, and when I made it good, *I wanted the money to be there as an assurance. . . .*" (Emphasis ours)

And his contract gave him the right to have the payment of June 15th made to him on June 15th and to be there then as an "assurance" to cover any title expense to which the appellants might be put.

Thus, the appellant, under the clear terms of his contract, was not obliged to perfect any defects in the abstract until after the payment of June 15, 1953, was made to him. Since the payment was never made as required clearly by the especially typed insertion in the written contract—which we have seen would control over any general printed form provision even if inconsistent

entirely therewith—and since there is more than enough money for the payment of the irrigation ditch lien, and since the contract itself provides that the funds called for to be paid on June 15th could be used for this purpose, it is respectfully submitted that this re-hearing should be granted and the judgment of this Court changed so as to effect a reversal of the judgment from which this appeal is taken.

Respectfully submitted,

GLENN WOODBURY and PEARL WOODBURY,
Petitioners and Appellants.

Leif Erickson, Helena, Montana.
William F. Shallenberger,
D. A. Paddock, Missoula, Montana.

Attorneys for Petitioners and Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel for the appellants does hereby certify that in his judgment the petition for re-hearing submitted herewith is well founded and that the same is not interposed for delay.

Dated August 31, 1956.

WILLIAM F. SHALLENBERGER
of Counsel for Appellants.